Maryland Law Review

Volume 48 | Issue 2 Article 7

Ricks v. State: Big Brother Has Arrived in Maryland

Thomas M. Messana

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Constitutional Law Commons

Recommended Citation

Thomas M. Messana, *Ricks v. State: Big Brother Has Arrived in Maryland*, 48 Md. L. Rev. 435 (1989)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol48/iss2/7

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

RICKS v. STATE: BIG BROTHER HAS ARRIVED IN MARYLAND

In *Ricks v. State*[1] the Maryland Court of Appeals held that a court-ordered surreptitious nonconsensual video surveillance and the concomitant recording of conduct in a private place violates neither the Maryland Wiretapping and Electronic Surveillance Act (Maryland Act),[2] nor the fourth amendment of the United States Constitution.[3] Noting that in some respects the Maryland Act is more restrictive than its federal counterpart,[4] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III),[5] the court of appeals rejected the appellants' claim that the Maryland Act prohibits video surveillance.[6] Further, the court concluded that video surveillance can be conducted under a search warrant issued pursuant to Maryland's general search warrant statute.[7]

---

1. 312 Md. 11, 537 A.2d 612 (1988). There were three appellants in *Ricks*: James A. Ricks, Kevin R. DeShields, and Van Allen Lewis. *Id.*

2. MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 to -413 (1984 & Supp. 1987); 312 Md. at 24, 537 A.2d at 618.

3. U.S. CONST. amend. IV; 312 Md. at 27-28, 537 A.2d at 620.

4. 312 Md. at 20, 537 A.2d at 616 ("it cannot be doubted . . . that in some particulars the Maryland Act is more stringent than its federal counterpart"). *See also* Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law*, 8 U. BALT. L. REV. 183, 221 (1979).

5. 18 U.S.C. §§ 2510-2521 (1982 & Supp. IV 1987). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) was only part of a major revision of federal criminal procedure enacted to contract the rulings of the Warren Court. The Senate report indicates that Title III followed the report of the President's Commission on Law Enforcement and Administration of Justice which itself was a response to the perception of rising crime in America. *See* S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2154 [hereinafter S. REP. NO. 1097] PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). *See generally* F. GRAHAM, THE SELF-INFLICTED WOUND (1970).

6. 312 Md. at 24, 537 A.2d at 618.

7. *Id.* at 30-31, 537 A.2d at 621. Maryland's search warrant statute provides:

> (a) Whenever it be made to appear to any judge of any of the circuit courts in the counties of this State, or to any judge of the District Court, by written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants, that there is probable cause, the basis of which shall be set forth in said affidavit or affidavits, to believe that any misdemeanor or felony is being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge, or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then the judge may forthwith issue a search warrant directed to any

This note suggests that while *Ricks* arguably was correctly decided, the decision was not the *fait accompli* the opinion suggests. Relying on an analysis developed in a series of cases, the seminal case being *Torres v. United States*,[8] the court appears to marshal a formidable body of case law upholding the use of surreptitious video surveillance by law enforcement agencies. Yet when the holdings and reasoning of the *Torres* series are examined in light of their situational context, it becomes obvious that their conclusions are not compelling. Because the court in *Ricks* declares them "well considered"[9] without analysis, the *Ricks* decision is called into question. Further, when current fourth amendment analysis is applied to *Ricks*, a problem appears with respect to how narrowly the surveillance order was drawn.[10] Ultimately, in light of the inherent problems with video surveillance and the ease with which courts have upheld its use, the field cries out for legislative guidance.[11]

---

duly constituted policeman, or police officer authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premises, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued, and provided further that any search or seizure under the authority of such search warrant, shall be made within 15 calendar days from the date of the issuance thereof and after the expiration of the 15-day period said warrant shall be null and void.

MD. ANN. CODE art. 27, § 551(a) (1987).

8. 751 F.2d 875, 884 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (district court had authority to issue warrants authorizing video surveillance of a private place); *accord* United States v. Ianniello, 808 F.2d 184, 195 (2d Cir. 1986) (affirming without discussing the government's use of electronic audio and video surveillance), *cert. denied*, 107 S. Ct. 3230 (1987); United States v. Biasucci, 786 F.2d 504, 509 (2d Cir.) (holding "that district courts, federal magistrates, and state judges may authorize television surveillance of private premises in appropriate circumstances"), *cert. denied*, 479 U.S. 827 (1986).

9. 312 Md. at 24, 537 A.2d at 618.

10. *See infra* notes 106-109 and accompanying text.

11. The commentaries on video surveillance are replete with requests for legislative action in the field. *See, e.g.*, Comment, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261, 298 (1976) (authored by David P. Hodges) [hereinafter *Big Brother*] ("[L]egislation should be enacted to prohibit the use of electronic visual surveillance techniques when such use intrudes upon an individual's reasonable expectation of privacy from such surveillance."); Note, *United States v. Torres: The Need For Statutory Regulation of Video Surveillance*, 12 J. LEGIS. 264, 264 (1985) (authored by Nancy J. Montroy) [hereinafter *Torres: Statutory Regulation*] ("Congress and the courts should control the use of new surveillance methods to prevent violations of individuals' fourth amendment rights.").

I. THE CASE

On June 8, 1984, the Baltimore City police and the federal Drug Enforcement Administration applied to a Baltimore City circuit court judge for an order authorizing the use of audio and video surveillance and recording devices in an ongoing investigation of an illegal drug organization.[12] The affidavit alleged that a Baltimore City apartment[13] was being used as a "processing house" where

---

12. 312 Md. at 16, 537 A.2d at 614.

13. In particular, the apartment was leased by Ms. Laverne Pickney, a nonparty. As reported by the court of appeals, the affidavit stated, "Laverne Pickney, did not reside there; that she resided at another named address where her automobile was registered; and neither she nor her motor vehicle was ever observed at or near the subject apartment. The gas and electric and telephone services were listed in Pickney's name . . . ." *Id.* at 17-18, 537 A.2d at 615. These circumstances gave rise to another issue in the case: did the appellants have standing to assert their fourth amendment claim of a reasonable expectation of privacy? The appellants argued that they were invitees and the government stipulated that they were in the apartment at the lessee's invitation. At the pretrial suppression hearing, the court answered "yes." *Id.* at 19, 537 A.2d at 615. The intermediate appellate court said "no." Ricks v. State, 70 Md. App. 287, 295, 520 A.2d 1136, 1140 (1987). The court of appeals noted that under current case law "mere presence in another's apartment, without more, would not suffice to establish a legitimate expectation of privacy[,] [but] [m]ore than mere presence . . . is shown in this case[,]" the court of appeals concluded, "we shall assume, without deciding, that the appellants had Fourth Amendment standing to challenge the search and seizure in this case." 312 Md. at 27, 537 A.2d at 620.

The concept of standing focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was the actual victim of the search or seizure. Jones v. United States, 362 U.S. 257, 261 (1960). The standing issue has evolved through a long line of Supreme Court cases. *See, e.g.*, California v. Greenwood, 108 S. Ct. 1625, 1627 (1988) (finding that defendants did not have a reasonable expectation of privacy in garbage placed outside the curtilage); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (finding that appellant did not have a sufficient legitimate expectation of privacy to contest the legality of a search of a purse where the search resulted in the disclosure of illegal drugs which appellant had placed there); Rakas v. Illinois, 439 U.S. 128, 142 (1978) (declaring arcane distinctions of property law do not determine standing and finding proper analysis of whether search or seizure violated fourth amendment turns on the question of "whether the disputed search and seizure has infringed an interest of the defendant which the fourth amendment was designed to protect"); Alderman v. United States, 394 U.S. 165, 176 (1969) (holding persons not parties to unlawfully overheard conversations or who did not own premises where conversations took place did not have standing to contest legality of surveillance, regardless of whether they were targets of surveillance); Wong Sun v. United States, 371 U.S. 471, 491-92 (1963) ("Our holding . . . that this ounce of heroin was inadmissible against Toy does not compel a like result with respect to Wong Sun. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.").

The court of appeals said that "more than mere presence" was shown in the *Ricks* case but assumed "without deciding the appellants had fourth amendment standing to challenge the search and seizure in this case." *Ricks*, 312 Md. at 27, 537 A.2d at 620. While

[t]he court's reluctance to address the more thorny "standing" issue is easily

controlled dangerous substances (CDS) were "cut" and packaged for street sale.[14] Basing their knowledge on an extensive preliminary investigation,[15] the police officers asked the court to issue an order for a single surreptitious entry to install both devices in order to acquire the evidence needed to demonstrate probable cause to arrest the organization's leaders.[16]

The court granted the order upon finding that the application complied with the requirements of Title III, the Maryland Act, and the fourth amendment, along with the requisite probable cause to believe that the CDS laws were being violated.[17] After several weeks of observation and twenty-five hours of recorded video tapes, a war-

---

understood and is not uncommon . . . , the "standing" question is a preliminary one that should be resolved, for if appellant has no lawful right to contest the respective searches, the question of their validity becomes moot. Putting the cart before the horse may sometimes be easier to do, but it does make the ultimate journey considerably more difficult.

Graham v. State, 47 Md. App. 287, 290-91, 421 A.2d 1385, 1387 (1980), *cert. denied*, 290 Md. 715 (1981) (citation omitted). Because the *Ricks* court assumed the appellants had standing and in light of the frequency with which the standing question is litigated, the next case on this issue may be brought on standing grounds.

14. 312 Md. at 16, 537 A.2d at 614.

15. *Id.* at 17 n.4, 537 A.2d at 614 n.4. The police investigation is chronicled as follows:

Pen registers were utilized; long distance telephone tolls and criminal history records were monitored; various forms of mobile and fixed surveillance were undertaken, as was use of contact and bumper beepers, attempts to obtain co-defendant cooperation, to infiltrate the organization, to conduct a grand jury investigation, to the issuance of search warrants, and other investigative methods.

Id.

16. *Id.* at 17, 537 A.2d at 614-15. The elements of probable cause have been described as follows:

Basic to search warrant protections is the requirement of *probable cause*. Its function is to guarantee a substantial probability that the invasion involved in the search will be justified by discovery of offending items. Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched.

Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961) (emphasis in original). The Supreme Court described the evils sought to be avoided by the probable cause requirement as follows:

The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required.

Henry v. United States, 361 U.S. 98, 100 (1959).

17. 312 Md. at 18, 537 A.2d at 615.

rant was issued to search the apartment.[18] The police discovered and seized both heroin and cocaine and arrested the appellants.[19]

Charged with possession and intent to manufacture and distribute heroin and cocaine, the appellants moved to suppress the evidence gained through the video surveillance.[20] Appellants asserted two defenses: that the video surveillance was an illegal search and seizure under the fourth amendment and that it was precluded by the Maryland Act.[21] Arguing that the Maryland Act was more restrictive than Title III, the appellants claimed "it was the public policy of this State to place greater restrictions on video surveillance than on . . . [the] less intrusive wire and oral communications."[22]

---

18. *Id.* "[O]fficers entered the air ducts of the apartment through the roof, shaved away part of the dry wall and implanted a miniature camera, focused on the dining room of the apartment." *Id.*

19. *Id.* Police arrested Ricks and DeShields in the Pickney apartment and, shortly thereafter, arrested Lewis who had fled when the police entered. *Id.*

20. *Id.* at 18-19, 537 A.2d at 615. The exclusionary rule was first postulated in Weeks v. United States, 232 U.S. 383 (1914):

> The effect of the fourth amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitation and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

Id. at 391.

Historically, the exclusionary rule has been the subject of much debate. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (holding that exclusionary rule does not apply in prosecution for a state crime); *but see* Mapp v. Ohio, 367 U.S. 643, 660 (1961) (overruling *Wolf* and holding the exclusionary rule applies in state prosecutions).

More recently, the Court has narrowed its scope. *See* Immigration and Naturalization Servs. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (following *Janis*, *infra*, exclusionary rule not applicable in civil deportation hearings); United States v. Leon, 468 U.S. 897, 920-21 (1984) (announcing good faith exception to exclusionary rule where police act pursuant to a search warrant); United States v. Havens, 446 U.S. 620, 627-28 (1980) (exclusionary rule does not apply to impeach testimony); Stone v. Powell, 428 U.S. 465, 494-95 (1976) (limiting use of exclusionary rule in collateral federal proceedings); United States v. Janis, 428 U.S. 433, 454 (1976) (evidence unlawfully obtained in good faith by state criminal law enforcement officials and turned over to federal officials need not be excluded in federal tax proceedings); United States v. Calandra, 414 U.S. 338, 350-52 (1974) (holding purpose of exclusionary rule is to deter unlawful police conduct, not to redress injury to the privacy of the searched victim, and therefore the exclusionary rule does not apply to evidence presented to a grand jury). *See generally* 1 WHARTON'S CRIMINAL PROCEDURE 313-17 (12th ed. 1975 & Supp. 1987).

For an interesting look at the exclusionary rule set against a historical backdrop see generally A. COX, THE COURT AND THE CONSTITUTION 235-49 (1987).

21. 312 Md. at 18-19, 537 A.2d at 615.

22. *Id.* *See infra* notes 56-62 and accompanying text for a discussion of the Maryland Wiretapping and Electronic Surveillance Act (Maryland Act). The court stated in its opinion that "considerations of public policy, with obvious Orwellian overtones—those

At the pretrial suppression hearing, the court found that the Maryland Act did not regulate video surveillance and therefore concluded that such surveillance was not prohibited.[23] At trial, the appellants were convicted of the offenses charged.[24] Both the court of special appeals[25] and court of appeals[26] upheld the conviction.

In this case of first impression, Chief Judge Murphy, writing for the court of appeals, declared that the central issue was whether video surveillance is permissible under the Maryland Act and if so, whether the surveillance violated the appellants' fourth amendment rights.[27] The court examined several federal court decisions[28] and a New York state court decision[29] rejecting the theory that the applicable audio surveillance act regulated video surveillance and held that the Maryland Act did not prohibit video surveillance.[30] While assuming, without deciding, that the appellants had fourth amendment standing to challenge the search and seizure,[31] the court declined to find a fourth amendment violation.[32] Following the criteria employed by other jurisdictions as to the appropriate standard of reasonableness in a fourth amendment review of video sur-

---

of Big Brother watching—are fully evident in this case . . . ." 312 Md. at 20, 537 A.2d at 616.

23. 312 Md. at 19, 537 A.2d at 615.

24. *Id.*, 537 A.2d at 616.

25. Ricks v. State, 70 Md. App. 287, 520 A.2d 1136 (1987). Affirming the appellants' convictions, the intermediate appellate court found "the appellants did not meet the burden of demonstrating a legitimate expectation of privacy in the searched premises, and none of their fourth amendment rights were violated." *Id.* at 295, 520 A.2d at 1140. By squarely answering the standing question, this opinion distinguished itself from the court of appeals' opinion.

At the intermediate appellate court level the appellants asserted several subsidiary errors: (1) the failure of the trial court to instruct the jury regarding the element of specific intent for the crime of possession with intent to manufacture heroin and cocaine, (2) the admissibility into evidence of an opinion identifying the individuals on the videotape, and (3) the admissibility into evidence of a nonexpert's opinion concerning the identity of several weapons. *Id.* at 291, 520 A.2d at 1138.

26. Ricks v. State, 312 Md. 11, 537 A.2d 612 (1988).

27. *Id.* at 13, 537 A.2d at 612. *But see* Avery v. State, 15 Md. App. 520, 539, 292 A.2d 728, 745 (1972) (where Maryland Court of Special Appeals visited issue of video surveillance prior to enactment of Maryland wiretap statute), *cert. denied*, 410 U.S. 977 (1973).

28. *See* cases cited *supra* note 8. *See also In re* Order Authorizing Interception of Oral Communications & Videotape Surveillance, 513 F. Supp. 421, 423 (D. Mass. 1980) (video surveillance permitted only when determined by audio surveillance alone that illegal activities within the scope of the order were taking place).

29. People v. Teicher, 52 N.Y.2d 638, 642, 422 N.E.2d 506, 507, 439 N.Y.S.2d 846, 847 (1981) (video surveillance does not violate fourth amendment rights).

30. 312 Md. at 24, 537 A.2d at 618.

31. *Id.* at 27, 537 A.2d at 620. *See supra* note 13 for a discussion of standing.

32. 312 Md. at 27-28, 537 A.2d at 620.

veillance,[33] the court utilized four elements of the Maryland audio surveillance statute[34] and found that the order was in conformity with these requirements.[35] On this basis, the court held that the video surveillance in *Ricks* complied with the search and seizure requirements of the fourth amendment.[36]

II. HISTORICAL BACKGROUND

A. The Fourth Amendment

Two conflicting policies meet in the fourth amendment: the right of the people to be free from governmental intrusion and society's need for effective law enforcement.[37] The framers of the amendment carefully grafted these two policies: "The right of the people to be secure in their persons, houses, papers and effects,

---

33. *Id.* at 29, 537 A.2d at 620. The basic purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary invasions of government. The fourth amendment balances the reasonable need for the search against the resulting intrusion. *See* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967) (the standard to guide a magistrate in the issuance of search warrants for administrative searches, *e.g.*, fire, health, housing, will vary necessarily with the municipal program being enforced).

34. 312 Md. at 29, 537 A.2d at 620-21. The four elements of the Maryland Wiretapping and Electronic Surveillance statute are: necessity, particularity, duration, and minimization. *See* MD. CTS. & JUD. PROC. CODE ANN. § 10-408(c)(3), (d)(1)(iii), (e) (1984 & Supp. 1987).

35. 312 Md. at 29-30, 537 A.2d at 621. The court was generous in finding that the order met the statutory prerequisites of the Maryland Act. Except for saying, *inter alia*, that the police and Judge Allen "were cognizant of these requirements" and that "approximately forty-nine pages of the application detailed why conventional law enforcement techniques were inadequate in solving the case," the court really does not analyze the order. *Id.* For example, in light of the strict minimization requirements imposed by the Maryland Act, why were 25 hours of video surveillance necessary? Did the 27-day extension of the surveillance correlate to some need for evidence in this case? If it did, what was that need?

36. *Id.* at 30-31, 537 A.2d at 621.

37. Berger v. New York, 388 U.S. 41, 53 (1967). The goal of the fourth amendment was stated as follows:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also* 1 W. LAFAVE, SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT § 3.1 (1978 & Supp. 1986) ("[t]he essence of the Fourth Amendment has never been better stated than in . . . Olmstead v. United States."); *Big Brother*, *supra* note 11, at 263.

against *unreasonable* searches and seizures, shall not be violated . . . ."[38] Thus, the policies underlying the fourth amendment are forever bound in uneasy balance resting upon a judicial determination of reasonableness. The courts have wrestled with this tension, especially as it is manifested through governmental electronic snooping.[39]

While the Supreme Court has not ruled on the constitutionality of surreptitious video surveillance, the Supreme Court, in *Berger v. New York*[40] and *Katz v. United States*,[41] has considered both the reasonable use of electronic aural surveillance by law enforcement agencies and the warrant requirements necessary for such surveillance. Briefly, the Court explicitly held that the use of electronic devices to surreptitiously monitor conversations was within the ambit of fourth amendment protections.[42] Also, the Court fashioned a two-part test to determine when governmental aural surveillance constitutes a search and seizure. First, the individual under surveillance must have exhibited a subjective expectation of privacy; and second, that expectation must be objectively reasonable.[43]

In addition to the reasonable expectation of privacy standard,

---

38. U.S. CONST. amend. IV (emphasis added). The amendment continues "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

39. *Big Brother*, *supra* note 11, at 269-75.

40. 388 U.S. 41 (1967). In *Berger* the Supreme Court held that the New York State Wiretap Statute, N. Y. CRIM. PROC. LAW § 700.05 (McKinney 1984 & Supp. 1988), was "too broad," and hence unconstitutional, in permitting (1) the installation and operation of surveillance equipment for 60 days upon a single showing of probable cause; (2) the renewal of the order without a present showing of probable cause; and (3) the issuance of an order without a termination date. 388 U.S. at 59-60.

41. 389 U.S. 347 (1967). In *Katz*, which enunciated the current constitutional test, the Supreme Court held that the recording of the petitioner's telephone conversation, by attaching an electronic listening device to the outside of a telephone booth, was an illegal search and seizure within the meaning of the fourth amendment. *Id.* at 353. The Court declared that the "Fourth Amendment protects people, not places," *id.* at 351, and that "wherever a man may be, he is entitled to know he will remain safe from unreasonable searches and seizures." *Id.* at 359.

42. *Id.* at 353. *See also Berger*, 388 U.S. at 63.

43. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's concurring opinion is the classic statement of the constitutional requirement.

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id.

the Court outlined the requisite elements of a warrant authorizing electronic aural surveillance.[44] The four constitutionally mandated requirements are particularity,[45] duration,[46] minimization,[47] and necessity.[48] These requirements must be strictly construed.[49] In considering the validity of Title III in relation to these requirements, the Maryland Court of Appeals stated in 1972 that to allow aural surveillance "without the strictest of controls would utterly destroy the basis of this nation's existence."[50]

---

44. *Berger*, 388 U.S. at 55-60. In addition to the form standards, *see infra* notes 45-48, in order to obtain a warrant, the Constitution requires a finding of probable cause, supported by oath or affirmation, by a neutral and detached magistrate. 388 U.S. at 54-55. *See* Coolidge v. New Hampshire, 403 U.S. 443, 473 (fourth amendment prohibits State Attorney General from issuing search warrants), *reh'g denied*, 404 U.S. 674 (1971); Johnson v. United States, 333 U.S. 10, 14 (1948) (requiring detached magistrate to authorize search). *But see* Shadwick v. City of Tampa, 407 U.S. 345, 347 (1972) (permitting issuance of arrest warrant by clerk of municipal court). *See generally* Connally v. Georgia, 429 U.S. 245, 251 (1977) (per curiam) (holding magistrate is not neutral and detached where receipt of fee accompanies *only* affirmative responses to a warrant request); Gerstein v. Pugh, 420 U.S. 103, 117-18 (1975) (holding that once a warrantless arrest is made, fourth amendment requires a prompt judicial determination of probable cause).

45. *Berger*, 388 U.S. at 55-58. Particularity not only refers to the fourth amendment command that a warrant may be issued only upon a finding of probable cause but also must "particularly [describe] the place to be searched, and the persons or things to be seized." *Id.* The *Berger* Court criticized the New York wiretap statute for its lack of particularity. *Id.* at 58. *See also Big Brother*, *supra* note 11, at 282-83.

46. *Berger*, 388 U.S. at 59. Duration refers to the length of time a search can continue; for example, "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." *Id. See also Big Brother*, *supra* note 11, at 283-84.

47. *Berger*, 388 U.S. at 59-60. Minimization refers to drawing narrowly the warrant authorization so that *only* those conversations which are connected with the subject of the investigation are intercepted. *Id. See also Big Brother*, *supra* note 11, at 284-88.

48. *Berger*, 388 U.S. at 60. Necessity refers to the lack of alternative investigative techniques open to the law enforcement agency to obtain the information. *Id. See also Big Brother*, *supra* note 11, at 288-89.

49. *Berger*, 388 U.S. at 56.

> By its very nature eavesdropping involves an intrusion on the privacy that is broad in scope. . . . [T]he "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures . . . ."

Id. (quoting Osborn v. United States, 385 U.S. 323, 329 n.7 (1966)) (citation omitted). *See also* State v. Bailey, 289 Md. 143, 151-54, 422 A.2d 1021, 1026-28 (1980) (evidence held properly suppressed when *ex parte* court order, authorizing wiretap, failed to provide a directive to terminate the wiretap operation upon attainment of objective); State v. Siegel, 266 Md. 256, 274, 292 A.2d 86, 95-96 (1972) (holding that a failure of wiretap order to contain statements complying with constitutionally mandated requirements caused the order and subsequent renewals to be void).

50. *Siegel*, 266 Md. at 260-61, 292 A.2d at 89. *See generally* Adair & Archer, *Electronic Surveillance*, 76 GEO. L.J. 626 (1988); Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969); Goldstock & Chananie,

B. *The Statutes*

Partially in reaction to the *Berger* and *Katz* decisions, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968.[51] Title III of the Act prohibits the nonconsensual interception of wire or oral communications by the use of electronic devices except when the law enforcement activity carefully follows the prescribed criteria.[52] Title III was designed to provide a uniform minimum national standard governing electronic interception of wire and oral communications.[53] Title III is not self-executing as applied to the

---

"Criminal" Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing, 136 U. PA. L. REV. 1855 (1988); Note, *Electronic Eavesdropping: Which Conversations Are Protected From Interception?*, 7 U. HAW. L. REV. 227 (1985) (authored by Cindy S. Ikenaga).

51. S. REP. No. 1097, *supra* note 5, at 2112. Prior to the enactment of Title III, section 605 of the Federal Communications Act of 1934 regulated the interception of communications. 47 U.S.C. § 605 (1982, Supp. III 1985 & Supp. IV 1986). It provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." *Id.* The statute was upheld by the Court. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (extending exclusionary rule to leads secured by illegal wiretaps); Weiss v. United States, 308 U.S. 321, 327 (1939) (declaring § 605 covered intrastate telephone calls); Nardone v. United States, 302 U.S. 379, 384 (1937) (holding § 605 prohibited federal officers from testifying in federal court as to evidence gained through illegal wiretap). *But see* Schwartz v. Texas, 344 U.S. 199, 203 (1952) (wiretap evidence gained in violation of § 605 admissible in state court).

As for "bugging," prior to *Berger-Katz* the Supreme Court held evidence gained through an unauthorized physical invasion of the defendant's premises was inadmissible. *See* Clinton v. Virginia, 377 U.S. 158, 158 (1964) (evidence gained by spike mike inadmissible); Silverman v. United States, 365 U.S. 505, 512 (1961) (same). *But see* Goldstein v. United States, 316 U.S. 114, 122 (1942) (permitting admission of evidence gained by dictaphone attached to wall). *See generally* Lopez v. United States, 373 U.S. 427, 439 (1963) (holding no eavesdropping occurred where an internal revenue agent recorded a conversation offering a bribe); On Lee v. United States, 343 U.S. 747, 751 (1952) (concluding that, absent a trespass, a wired-for-sound informant did not violate fourth amendment).

Through this judicial activism, the Federal Bureau of Investigation crime statistics began to rise. F. GRAHAM, *supra* note 5, at 11. Moreover, the American community perceived that the courts were protecting criminals to the detriment of the law-abiding citizen. *Id.* Law and order, with its racial overtones, became an important issue in the 1968 presidential election. *See id.* at 12-15; D. KEARNS, LYNDON JOHNSON AND THE AMERICAN DREAM 307-08 (1976). *See generally* R. HARRIS, THE FEAR OF CRIME (1969). Against this backdrop, the Omnibus Crime Control and Safe Streets Act was enacted in 1968. 18 U.S.C. §§ 2510-2521 (1982 & Supp. IV 1987).

52. S. REP. No. 1097, *supra* note 5, at 2153-54. The declared purpose of Title III was "to combat organized crime." *Id.* at 2157. But in crafting carefully the prescribed criteria, Title III recognized that the rapid advancement in the technology of electronic surveillance offered a boom, especially in the area of mutual security, and a danger to a democratic society. *Id.* at 2156-57.

53. *Id.* at 2153. *See* Ricks v. State, 312 Md. 11, 13-14, 537 A.2d 612, 613 (1988).

states and requires a state act to be no less restrictive than the federal counterpart.[54] Maryland enacted just such a statute in 1973.[55]

The Maryland Act was fashioned to comply with Title III, although generally it is observed that the Maryland Act provides greater freedom from surreptitious electronic surveillance.[56] Nonetheless, there are several very significant differences between the two acts.[57] First, the Maryland Act broadens the definition of oral communications to include a greater class of communications.[58] Second, the Maryland Act prohibits interception unless all parties to the communication consent.[59] Third, the Maryland courts have required strict compliance with the requirements of section 10-408 of the Maryland Act.[60] This section requires a showing that normal investigative procedures have failed or will not succeed.[61] In contrast, some federal courts merely require substantial compliance to the federal counterpart.[62]

---

54. 18 U.S.C. § 2516 (1982 & Supp. IV 1987).

55. MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 to -413 (1984 & Supp. 1987).

56. Gilbert, *supra* note 4, at 221. Interestingly, the author of this article was also the author of the intermediate appellate court's opinion in Ricks v. State, 70 Md. App. 287, 520 A.2d 1136 (1987).

57. *See* Gilbert, *supra* note 4, at 192. Judge Gilbert's commentary outlines a number of differences in substance and style between the Maryland Act and Title III, only a few of which are applicable to this note. The appellants utilized these differences as a basis for their argument that although the courts had already declared that Title III did not cover video surveillance, the Maryland Act did. *Ricks*, 312 Md. at 23-24, 537 A.2d at 619. The appellants, however, failed to explain which differences they were relying upon. *Id.* Appropriately, the court refused to guess.

58. Gilbert, *supra* note 4, at 192. *See also* MD. CTS. & JUD. PROC. CODE ANN. § 10-401(2) (1984 & Supp. 1987).

59. Gilbert, *supra* note 4, at 194. *See also* MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(3) (1984 & Supp. 1987).

60. MD. CTS. & JUD. PROC. CODE ANN. § 10-408 (1984 & Supp. 1987). "The statute sets up a strict procedure that *must* be followed and we will not abide any deviation, no matter how slight, from the prescribed path." State v. Siegel, 266 Md. 256, 274, 292 A.2d 86, 95 (1972) (emphasis in original).

61. MD. CTS. & JUD. PROC. CODE ANN. § 10-408(a)(3) (1984 & Supp. 1987).

62. Gilbert, *supra* note 4, at 205-07. In United States v. Giordano, 416 U.S. 505, 523 (1974), for example, the Court held that an authorization by the Attorney General's Executive Assistant did not comply with Title III. In particular, the Court found both a failure to comply with 18 U.S.C. § 2518(1)(b)(v), which requires the government to include in a wiretap application the names of all persons whom it has probable cause to believe are engaged in the criminal activity under investigation and whose conversation it expects to intercept, and 18 U.S.C. § 2518(8)(d), which requires the government to furnish the judge with a description of the classes of persons whose conversations have been intercepted. Although evidence obtained in violation of the statute was suppressed in *Giordano*, the Court found that a statutory violation does not necessitate exclusion of the evidence obtained by the wiretap.

C. *Case Law*

The federal courts considering this issue uniformly have held that Title III does not apply to video surveillance and have permitted the use of this surveillance.[63] For example, in a memorandum supporting the authorization of a surreptitious entry into a private place for the implantation of electronic audio and video surveillance devices, Judge Keeton for the Federal District Court of Massachusetts concluded that Title III is not "formally applicable to video surveillance."[64]

Similarly, Judge Posner, writing for the Seventh Circuit in *Torres v. United States*,[65] held that a district court has the authority to issue warrants authorizing video surveillance of a private place.[66] In *Torres*, a terrorist organization allegedly was assembling bombs; the warrants authorizing the video surveillance of this activity were held to be permissible under the fourth amendment.[67] The decision relied on the inherent power of a court of general jurisdiction to issue search warrants and a broad reading of Rule 41 of the Federal Rules of Criminal Procedure[68] as applied by the Supreme Court in *United*

---

63. *See* cases cited *supra* note 8.

64. *In re* Order Authorizing Interception of Oral Communications & Videotape Surveillance, 513 F. Supp. 421, 423 (D. Mass. 1980). In this well-reasoned memorandum, Judge Keeton struck the proper balance between an individual's rights to be free from government intrusion and law enforcement and the need to protect the community. In granting the application, the court directed the agents implementing the surveillance to employ the strictest minimization possible. *Id.* Video surveillance was permitted only when it was determined by audio surveillance alone that illegal activities within the scope of the order were taking place. *Id.* Further, the duration of the video surveillance was subject to the same constraints as imposed under Title III. *Id.* Assuming that an order authorizing video surveillance ever is permissible without legislative sanction, this was the only sensible alternative.

65. 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

66. *Id.* at 884.

67. *Id.*

68. Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.
>
> (b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.
>
> (c) Issuance and Contents.

States v. New York Telephone Co.[69] Judge Cudahy, in his concurring opinion, criticized the *Torres* majority's reasoning.[70] Although concurring in the result, he construed Title III in light of the Foreign Intelligence Surveillance Act of 1978 (FISA)[71] and found express statutory authorization for video surveillance.[72] He concluded that tying Title III to FISA "avoids the majority's anomaly of subjecting the most dangerously intrusive form of electronic surveillance" to the least restrictive oversight.[73]

> (1) Warrant upon Affidavit . . . . If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched.

FED. R. CRIM. P. 41(a), (b), (c)(1).

69. 434 U.S. 159 (1977). In *New York Tel. Co.*, the Court determined that the use of a pen register, an electronic device used to record dialed telephone numbers, is not an interception of oral or wire communications under Title III because the telephone company routinely records such information for billing purposes. *Id.* at 165-68. *See also* FED. R. CRIM. P. 41(b). "Pen registers do not 'intercept' because they do not acquire the 'contents' of the communication, as that term is defined by 18 U.S.C. § 2510(8). Indeed, a law enforcement official could not ever determine from the use of a pen register whether a communication existed. These devices do not hear sound." *New York Tel. Co.*, 434 U.S. at 167. *See* Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding that the use of a pen register is not governed by fourth amendment). *See generally* Note, *Installation and Use of a Pen Register Does Not Constitute a Fourth Amendment Search*, 38 MD. L. REV. 767 (1979).

70. Torres v. United States, 751 F.2d 875, 886-95 (7th Cir. 1984) (Cudahy, J., concurring), *cert. denied*, 470 U.S. 1087 (1985).

71. 50 U.S.C.A. §§ 1801-1811 (West Supp. 1988). *See generally* Giesy, *Jurisdictional Limitations on the Foreign Intelligence Surveillance Court*, 8 SUFFOLK TRANSNAT'L L.J. 259 (1984); Note, *The Constitutionality of the Foreign Intelligence Surveillance Act of 1978*, 36 VAND. L. REV. 231 (1983) (authored by J. Anderson); Note, *A Constitutional Test for Foreign Electronic Intelligence Surveillance*, 8 N.C. J. INT'L L. & COM. REG. 77 (1982) (authored by T. Lischer); Reazer, *Needed Weapons in the Army's War on Drugs: Electronic Surveillance and Informants*, 116 MIL. L. REV. 1 (1987).

72. 751 F.2d at 887. Judge Cudahy urged that Title III and FISA "are written to impose a comprehensive regulatory scheme on the use of electronic surveillance in the United States whenever there is a reasonable expectation of privacy. Title III was enacted to govern domestic surveillance activity, and . . . expressly exempted from its provisions, electronic surveillance for national security purposes." *Id.* at 887-88. "FISA repealed the [national security] exemption and declared that the executive branch does not have inherent authority to undertake electronic surveillance even in national security and counterintelligence cases." *Id.* at 888. "FISA make[s] it unmistakably clear that government (federal, state and local) may not use lightly intrusive forms of electronic surveillance unless it does so in accordance with either Title III or FISA." *Id.* Judge Cudahy further interpreted FISA's definition of electronic surveillance as broad enough to cover video surveillance and declared "if the video surveillance in this case was not expressly authorized by either Title III or FISA, then it would be prohibited by law." *Id.* at 889.

73. *Id.* at 895. Judge Cudahy concluded, "[M]y approach subjects this highly intrusive form of surveillance to at least as much constraint as less intrusive forms are subject

In 1986 the Second Circuit decided two cases relying on the reasoning of *Torres*: *United States v. Biasucci*[74] and *United States v. Ianniello*.[75] In *Biasucci* the defendants appealed their convictions on various counts of extortion and Racketeer Influenced and Corrupt Organizations Act (RICO) violations arising out of a loansharking operation.[76] They alleged that court-ordered visual and aural surveillance was improper because there was no statutory authority for such surveillance and thus the fruits of such surveillance should be suppressed.[77] "Finding the reasoning of *Torres* to be compelling," the court joined the Seventh Circuit and held "that district courts, federal magistrates, and state judges may authorize television surveillance of private premises in appropriate circumstances."[78]

In *Ianniello* the defendants appealed their convictions for violations of RICO, mail fraud, and tax evasion.[79] The defendants alleged that the government's evidence, which was derived from electronic audio and video surveillance, should be suppressed. The court affirmed the convictions without discussing these contentions, finding them to be without merit.[80]

In addition to these federal cases, state courts have upheld

---

to, and it accords with the general congressional design of closely regulating—prohibiting—these somewhat awesome forms of surveillance." *Id.*

74. 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986). The defendants in *Biasucci* devised a scheme that attracted customers with credit problems through offers of legitimate financing. Once baited, the customers were told that the advertized funds currently were not available but that emergency funds at interest rates of 1.5 to 5% per week were. As part of the scheme the customers were required to sign documents concealing the actual interest rates. *Id.* at 506.

75. 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). The defendants in *Ianniello* operated restaurants and bars through front companies in order to skim from the income receipts. In so doing, they failed to report the total income to state and federal taxing authorities, falsified statements in support of applications for liquor licenses from the New York State Liquor Authority and made false statements before the United States Bankruptcy Court for the Southern District of New York. *Id.* at 186-88.

76. 786 F.2d at 506. In addition to the claims of error based on the video surveillance, the defendants argued (1) that misconduct on the part of the prosecutor deprived them of a fair trial; (2) that the trial court erroneously charged the jury on the state of mind the government had to prove to establish the "collection of unlawful debt"; and (3) that the imposition of consecutive, as opposed to concurrent, sentences violated the double jeopardy clause of the fifth amendment. *Id.*

77. *Id.* at 507.

78. *Id.* at 509.

79. 808 F.2d at 186.

80. *Id.* Unlike the appellate court, the district court's opinion provides a plethora of analysis of the electronic surveillance. United States v. Ianniello, 621 F. Supp. 1455, 1460-73 (S.D.N.Y. 1985). Nevertheless, because the federal courts construing Title III permit substantial compliance, *id.* at 1461, rather than the strict compliance required by the Maryland courts interpreting the Maryland Act, *see supra* note 60, the *Ianniello* lower court opinion is inapposite to Ricks v. State, 312 Md. 11, 537 A.2d 612 (1988).

court-ordered video surveillance.[81] In *People v. Teicher*[82] a dentist was ultimately convicted of sexual abuse by evidence gained through video surveillance. New York's highest court dismissed the dentist's contention that the warrant was improper without express statutory authority and found that the video surveillance did not violate his fourth amendment rights.[83]

III. ANALYSIS

While courts have variously described electronic eavesdropping and the interception of oral communications as "Orwellian,"[84] "Frankenstein's monster,"[85] and "the greatest of all invasions of

---

81. *See, e.g.*, Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972), *cert. denied*, 410 U.S. 977 (1973). In *Avery* the court upheld a conviction for assault and battery where a doctor was observed on closed-circuit television touching the breast of his patient. *Id.* at 527, 292 A.2d at 735. The doctor advanced seven issues relating to the television monitored evidence and the court rejected them all. The court found that the *Katz* rational did not apply in this case because the doctor, while at the victim's house, did not have a reasonable expectation of privacy. *Id.* at 539, 292 A.2d at 743. The court found that the police's failure to procure antecedent judicial authority prior to the interception did not violate MD. ANN. CODE art. 27, § 125A (1987 & Supp. 1988), a statute prohibiting audio surveillance without the consent of the parties, because the statute regulated audio, not video, surveillance. 15 Md. App. at 542-43, 292 A.2d at 744. Furthermore, the court held that the failure of the State to record the video did not make the testimony of the State's witnesses, who actually viewed the monitor, secondary evidence, nor was their testimony hearsay. *Id.* at 544-45, 292 A.2d at 745. The court dismissed the doctor's claim that by not recording the evidence, the State in effect made him a victim of compulsory self-incrimination as "frivolous and without merit." *Id.* at 545, 292 A.2d at 745. The court refused to read MD. ANN. CODE art. 27, § 555B (1987), which requires the Attorney General to approve the monitoring of a telephone conversation, as a restriction on video monitoring. 15 Md. App. at 545-46, 292 A.2d at 745. Finally, the court refused to hold that the lack of a recording was tantamount to a suppression of exculpatory evidence by the State. *Id.* at 546, 292 A.2d at 746. *See also* Sponick v. Detroit Police Dep't, 49 Mich. App. 162, 198, 211 N.W.2d 674, 690 (1973) (holding Title III not applicable to photographic surveillance and that defendant had no reasonable expectation of privacy in a public tavern).

82. 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981). In *Teicher* the police initiated an investigation after two female patients complained of a male dentist's sexual advances toward them while they were under the influence of anesthesia. After numerous unsuccessful efforts to obtain additional evidence, police placed a video camera in the dentist's office to monitor his treatment of patients who had consented to the video taping. A policewoman was enlisted as a decoy. *Id.* at 642-45, 422 N.E.2d at 507-09, 439 N.Y.S.2d at 847-49.

83. *Id.* at 642, 422 N.E.2d at 507, 439 N.Y.S.2d at 847.

84. *See Big Brother, supra* note 11, at 261. *See also* G. ORWELL, 1984 (1961).

85. State v. Siegel, 266 Md. 256, 257, 292 A.2d 86, 87 (1972). Judge Digges' colorful language places this subject in perspective:

> This case points up the great problems both legal and moral that we must again ponder in the wake of mankind's continuing scientific advancement—an advancement that staggers the imagination with its potential for good but causes us pause for fear that we may create "Frankenstein's" monster and be unable to

privacy,"[86] they and the legislature nevertheless allow it as a permissible investigative tool of law enforcement. And while courts have remarked that video surveillance is "extraordinarily intrusive"[87] and that "[i]t cannot be doubted . . . that video surveillance is more intrusive than audio surveillance,"[88] the Maryland Court of Appeals upheld a court-ordered nonconsensual surreptitious video surveillance without express legislative sanction.[89] Although the result may be correct, *Ricks'* analysis is built upon a house of cards.

A. Incorrect Reliance on Persuasive Case Law

Citing *Torres* and its progeny[90] for authority contravening the appellants' position that the Maryland Act's silence on video surveillance means that the legislature has precluded its use,[91] the court declares video surveillance appropriate without providing further analysis. The court stated, "We think the federal cases are well considered and, notwithstanding the differences in several provisions between the two laws, it is clear that the Maryland Act, like Title III, reaches only oral and wire communications and does not regulate video surveillance."[92]

> channel its growth. This is not a new or even a unique quandary but one which most recently came into sharp focus with the advent of the atomic age. Nuclear energy offers the promise of relief to a large portion of the earth's population by alleviating such pressing problems as famine and plague but it also portends the very real menace of total destruction because of the weaponry it has produced. The industrialization of most of the world, while offering a life style unparalleled in the history of civilization, has also polluted much of nature's beauty and threatens to contaminate the very air we breathe. This same dichotomy applies to the development of electronic equipment.

Id. (footnote omitted). Strangely, this language, which appears to an hyperbole, is frankly quite restrained in light of a recent court of special appeals decision. *See* Schochet v. State, 75 Md. App. 314, 541, A.2d 183, *cert. granted*, 313 Md. 637, 547 A.2d 201 (1988) (holding a statute prohibiting unnatural and perverted sexual practices not to violate constitutional rights to privacy when applied to private act of fellatio between consenting, unmarried, heterosexual adults). Synthesizing *Schochet* in light of *Ricks*, Judge Wilner observed in dissent, "If the police can install a camera in the dining room, why not in the bedroom? The requisite probable cause is not that hard to come by." *Id.* at 360 n.2, 541 A.2d at 205 n.2.

86. Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring).

87. *In re* Order Authorizing Interception of Oral Communications & Videotape Surveillance, 513 F. Supp. 421, 422 (D. Mass. 1980).

88. Ricks v. State, 312 Md. 11, 20, 537 A.2d 612, 616 (1988).

89. *Id.* at 30-31, 537 A.2d at 621.

90. *See* cases cited *supra* note 8.

91. 312 Md. at 21-23, 537 A.2d at 616-19. The court also cited *In re* Order Authorizing Interception of Oral Communications & Videotape Surveillance, 513 F. Supp. 421 (D. Mass. 1980).

92. 312 Md. at 24, 537 A.2d at 618.

On closer examination, the federal cases are distinguishable from *Ricks* and, with the exception of *Torres*, it is questionable whether they are "well considered." In *Torres* a terrorist organization was allegedly constructing bombs in a safe house.[93] The wanton destruction which would have been visited upon innocent bystanders had they completed their heinous work provided the most compelling case for a judicially sanctioned order permitting video surveillance without express legislative authority.[94] A drug conspiracy, such as the one in *Ricks*, despicable as it is, simply does not rise to the level of immediate and indiscriminate harm as a bomb placed in a bus station or airport.

In addition, *Biasucci* and *Ianniello* are of questionable authority.[95] These cases involved, respectively, loansharking and mail fraud. Even though both of these crimes are serious, they do not involve the type of potential societal harm found in the circumstances of *Torres*. For that reason alone, *Torres* is not proper authority and video surveillance should not have been permitted without prior legislative approval. Further, both cases relied upon *Torres*' reasoning for their analysis rather than weighing law enforcement's need for video surveillance against the constitutional right to be free from unreasonable searches and seizures.[96] In fact, *Ianniello* affirmed the district court's holding on video surveillance issue without *any* analysis of this issue.[97] Thus, *Biasucci* and *Ianniello* provide little guidance to the court's decision in *Ricks*.

The *Ricks* court further relied on *Teicher* "as instructive on the point"[98] that video surveillance is not regulated by an aural surveillance statute. *Teicher*, however, cannot be used to support a holding authorizing nonconsensual video surveillance; that is, in *Teicher* the

---

93. United States v. Torres, 751 F.2d 875, 876 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

94. *Id.* at 887.

95. *See supra* notes 74-80 and accompanying text.

96. *See* United States v. Biasucci, 786 F.2d 504, 509 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986). The *Biasucci* court said, "Finding the reasoning in *Torres* to be compelling, we join the Seventh Circuit and hold that district courts . . . may authorize television surveillance of private premises in appropriate circumstances." *Id.*

97. United States v. Ianniello, 808 F.2d 184, 186 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). The *Ianniello* court said:

> We affirm, and discuss only the questions concerning the construction of the indictment, the definition of a pattern of racketeering activity under [RICO] . . ., the elements of mail fraud . . . , the effect of the twenty-first amendment on the federal government's ability to regulate the mails, and the corroboration necessary to convict on a co-conspirator's statement.

Id. (citation omitted).

98. Ricks v. State, 312 Md. 11, 24, 537 A.2d 612, 618 (1988).

victim was an undercover policewoman who consented to the surveillance.[99] Had this been merely an aural surveillance in Maryland, and not the more intrusive video surveillance, the consent of only one party would not have been enough to meet the strictures of the Maryland Act.[100] Nonetheless, there was no consenting party in *Ricks* and thus *Teicher* should provide no instruction whatsoever to any court considering facts like those found in *Ricks*.

B. Minimization

Video surveillance is different in kind, and not merely in degree, from audio surveillance. Because the *Ricks* decision creates the anomaly of the most dangerously intrusive form of electronic surveillance being subject to the least scrutiny, only the gravest of circumstances can justify it.[101] The *Torres* court recognized that video surveillance is more invasive of privacy than audio surveillance, "just as a strip search is more invasive than a pat-down search . . . ."[102] Thus, only under the *strictest guidelines* should it be permitted.

In allowing a video surveillance upon nothing less than the most compelling situation, Judge Keeton struck the proper balance.[103] After noting that Title III is inapplicable and that video surveillance is more intrusive than audio surveillance, the court permitted the video surveillance but only under the most circumscribed conditions.[104] That is, the court concluded that the video surveillance component could be activated only *after* it had been determined by the audio component alone that illegal activities within the scope of the investigation were taking place. Thus, the court imposed the strictest minimization requirement possible required by

---

99. People v. Teicher, 52 N.Y.2d 638, 644-55, 422 N.E.2d 506, 509, 439 N.Y.S.2d 846, 849 (1981).

100. *See* MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(3) (1984 & Supp. 1987).

101. *Torres: Statutory Regulation*, *supra* note 11, at 269-70.

> Moreover, the privacy interest actually invaded by video surveillance is much greater than the invasion posed by a Title III interception. The moment one person speaks with another, he has lost part of the expectation of privacy accorded to the speech. The person spoken to can always relate what he has heard. On the other hand, when a person believes he is alone, absent any known observers, he has an absolute expectation of privacy even if engaging in criminal activity. While electronic eavesdropping may be avoided by maintaining silence, video surveillance is literally inescapable.

Id. (footnotes omitted).

102. 751 F.2d 875, 885 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

103. *In re* Order Authorizing Interception of Oral Communications & Videotape Surveillance, 513 F. Supp. 421, 423 (D. Mass. 1980).

104. *Id.*

Berger-Katz while still allowing the surveillance to take place.[105]

The court in *Ricks* did not fully meet this minimization requirement. While the court order attempted to minimize the video surveillance,[106] it was not drawn as narrowly as Judge Keeton's order because it did not utilize aural surveillance as a trigger in activating visual surveillance.[107] Perhaps this was because the affidavit alleged "that the organization's members were so disciplined in their speech as *possibly* to result in failure of interception of oral communications by audio devices . . . ."[108] Nonetheless, this did not preclude the police officers who were monitoring the audio devices to activate the video surveillance when they became reasonably suspicious of criminal activities. While this does leave some discretion to the police officers, it permits a less intrusive video surveillance than the one ordered in *Ricks*.[109]

Notwithstanding these concerns, under existing law the *Ricks* surveillance probably was permissible. Indeed, because Title III and the Maryland Act do not regulate video surveillance, it is within the realm of the judiciary to determine whether such surveillance is constitutional. No court has yet held that video surveillance is per se unconstitutional and because the court of appeals applied the *Berger-Katz* standard in a fashion similar to other courts, arguably the

---

105. *Id.*

106. Ricks v. State, 312 Md. 11, 30, 537 A.2d, 612, 621 (1988).

> Finally, the order required that strict minimization precautions be adhered to so that communications and activities not otherwise subject to the order, *i.e.*, those not drug-related, would not be recorded. Specifically, Judge Allen ordered that (1) the camera was to be activated only when someone was in the apartment; (2) that the camera was to be turned off if it was determined that the activity did not relate to or was not a prelude to drug activity; (3) that extremely circumscribed spot monitoring would be allowed only to determine if the activity related to drugs; and, (4) that any privileged or private communications not related to drug activities were to be minimized to the maximum extent possible.

Id.

107. *In re Order*, 513 F. Supp. at 423.

> [T]he application represents that the agents implementing the video surveillance will be directed that the video surveillance component be turned on *after* it has been determined from the audio component that communications involving illegal activities or illegal activity itself, within the scope of the proposed investigation, is taking place and that the video component remain on only as long as and under the same constraints as are imposed in oral interception for the purpose of minimizing the intrusion consistently with the requirements of Title III.

Id. (emphasis in original).

108. *Ricks*, 312 Md. at 17, 537 A.2d at 614 (emphasis added).

109. *See* Berger v. New York, 388 U.S. 41, 58-59 (1967). Police discretion is problematic in all search warrant cases because of the fourth amendment requirement of particularity.

court has followed existing precedent. Nevertheless, more should be required. The Constitution is not a statute prescribing exact standards of conduct but is a check upon the abuse of personal freedoms. Since the Supreme Court appears to be content with the lower court decisions, the field cries out for legislative guidance.

IV. CONCLUSION

In *Ricks* the Maryland Court of Appeals upheld a court-ordered surreptitious nonconsensual video surveillance of a private dwelling by finding that the Maryland Act, like Title III, does not regulate such conduct and that the fourth amendment standards imposed by *Berger* and *Katz* were met. Based on the interpretations of other jurisdictions, the conclusion probably is correct, which makes it all the more disturbing. The real danger of routine audio and video surveillance is that "every sound, every word, and every gesture—everything except the targets' unexpressed thoughts"[110] is subject to governmental detection. Only under the *most* compelling circumstances, such as immediate risk of death or grievous bodily harm, should society's safety be found to outweigh the guarantees of freedom found in the fourth amendment; the circumstances of the case should be so compelling as to leave a court no other choice. Yet too many courts have found this dangerous and most intrusive form of surveillance permissible under circumstances less compelling than those necessary for less intrusive electronic surveillance devices. Therefore, it is up to the legislature to bring order to the field. As the New York Court of Appeals concluded in *Teicher*,

> The degree of intrusiveness inherent in video electronic surveillance demands unswerving adherence to each of the limitations placed upon the use of this device. Moreover, because the use of this investigative technique poses a threat to the privacy of citizens, legislative scrutiny of the field and the enactment of specific guidelines would appear to be in order.[111]

The decision in *Teicher* was written in 1981. It appears such guidelines are long overdue.

THOMAS M. MESSANA

---

110. United States v. Torres, 751 F.2d 875, 891 (7th Cir. 1984) (Cudahy, J., concurring in result), *cert. denied*, 470 U.S. 1087 (1985).

111. People v. Teicher, 52 N.Y.2d 638, 656, 422 N.E.2d 506, 515, 439 N.Y.S.2d 846, 855 (1981).